

Indian Child Welfare Act Guidelines presentation – Wyoming webinar – March 2016

Prepared by Indian
Child Welfare Programs



Revised Guidelines: Overview

February 25, 2015, DOI/BIA released revised ICWA Guidelines for state courts and agencies effective immediately

- These supersede and replace the 1979 guidelines
- Expand application from just state courts to state courts and child welfare agencies

<http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>

Proposed Federal Regulations: Overview

March 20, 2015, DOI/BIA released a Notice of Proposed Rulemaking (NPRM) for new proposed ICWA regulations

- Over 2,100 comments received; the most for any BIA regulation ever promulgated.
- DOI/BIA will analyze comments and issue a final rule, probably in late 2015 or early 2016
<http://www.bia.gov/cs/groups/public/documents/text/idc1-029629.pdf>

Key provisions

- Provide minimum federal standards and best practices to ensure compliance with ICWA
 - Where applicable state (or other federal law) provides a higher standard of protection to parents, those are to be followed
- Active efforts- more than reasonable efforts -
 - Provides 15 examples of active efforts
 - Should begin at the moment a case or investigation begins that may lead to removal and be conducted while verifying a child's ICWA-eligibility
 - State must document that active efforts were provided prior to removal and before TPR and that they were unsuccessful

Key Provisions

Require courts and agencies to:

- Inquire in every proceeding if a child is or could be an Indian child
- Should ask even in proceedings where the child is not removed (e.g., investigations, alternative response, differential response)
- If reason to believe the child is an Indian child, apply ICWA unless or until the court determines that the child is not a member or eligible for membership in an Indian tribe
- Tribe must be contacted to confirm ICWA-eligibility of the child

Key Provisions

ICWA applies to any Indian child in a State child custody proceeding. The Guidelines reject the *Existing Indian Family Exception (EIF)*. Courts may not consider

- Whether the Indian parent ever had custody of the child
- The extent to which parents or children are connected to the tribe, Indian communities or customs

Voluntary proceedings where there is consent to a foster care, pre-adoptive or adoptive placement or termination of parental rights are covered by the Act; informal placements where child can be returned upon demand are not

Key Provisions

Agencies should ask every family whether there is reason to believe a child is an Indian child

- The agency should also ask whenever the state opens an investigation or provides family services (including alternative response/differential response)

Court should ask all parties to certify on the record whether there is reason to believe the child is an Indian child

- Can request genograms or domicile/residence information as part of the certification

If there is reason to believe the child is an Indian child, then the court must confirm that the agency used active efforts to engage the child's tribe(s) to verify membership or eligibility for membership

Key Provisions

An agency or court has reason to believe that a child is an Indian child if any party, agency (or employee thereof), officer of the court or the child provides/has discovered information that the child is Indian or if the domicile or residence of the Indian child is on a reservation or in a predominantly Indian community

Where anonymity is a concern the obligation to determine ICWA eligibility is not relieved.

- Relevant documents, however, must be kept confidential/under seal

Court should allow alternative methods of participation in court hearings

- telephonic, videoconferencing, etc.

Key Provisions

Only a tribe can determine child's membership

- No requirement that a child have certain contacts with tribe or certain blood quantum
- Tribe need not formally enroll a child for the child to be a member
- State cannot substitute its judgment
- BIA can no longer provide determination

Key Provisions

- Notice is required for each initial proceeding and every “child custody proceeding” thereafter, both involuntary and voluntary proceedings.
- If a child is transferred between two states via the Interstate Compact for the Placement of Children (ICPC), both states’ courts must send notice to the tribe

Key provisions

State may only remove or place a child on an emergency basis to prevent imminent physical damage or harm

- Must be as short as possible and end when danger is no longer present
- Applies to both children domiciled on reservation who are temporarily off reservation and children domiciled off reservation

If agency knows/has reason to know the child is an Indian child agency must

- Treat child as Indian child: provide notice, active efforts, take steps to confirm if child is an Indian child
- Temporary emergency custody cannot be continued for more than 30 days without full ICWA-compliant child custody proceeding unless “extraordinary circumstances”

Key Provisions

The tribe, parent, or Indian custodian a child custody proceeding may request orally or in writing that a case be transferred to tribal court

- The right to request applies to each distinct child custody proceeding
- May be requested at any stage of the proceeding

State Court must transfer the case unless

- Either parent objects to the transfer
- Tribal court declines jurisdiction
- State court determines that “good cause” exists to deny transfer

Presumption in favor of transfer

Key Provisions

In determining good cause, the court may not consider:

- whether or not the case is at an “advanced stage”
- whether transfer would result in a change of placement for the child
- the child’s contacts with the tribe or reservation
- the socio-economic conditions or any perceived adequacy of the tribal agency or court
- the tribal court’s prospective placement for the child

The burden to establish “good cause” to not transfer is on the party opposing the transfer.

Key Provisions

Clear and convincing evidence must show a causal connection between conditions in the home and serious physical or emotional harm to the child (the standard in ICWA) in order for a child to be placed in foster care

- Evidence of poverty, single-parenting, inadequate housing, substance abuse, or non-conforming social behavior by itself cannot meet the standard of proof

Key Provisions

Placement preferences must be followed, unless there is good cause to not do so

If the preferences cannot be met, the agency must

- Demonstrate through clear and convincing evidence that a diligent search has been conducted
- Include notification and explanation provided to:
 - Parents/Indian custodians
 - All known/reasonably identifiable extended family members
 - The tribe
 - For foster care or pre-adoptive placement specifically
 - All of the homes approved/licensed by the tribe
 - All Native foster homes in the State

Key Provisions

The party seeking to assert “good cause” must show one or more of the following considerations:

- Request of both parents after reviewing ICWA preferences
- Request of child if she can understand the decision at hand
- Extraordinary physical or emotional needs of the child
 - Cannot include ordinary bonding or attachment due to a noncompliant placement
 - Does not include an independent best interest determination because the Act itself lays out what is in the best interest of an Indian child (this provision was not included in the proposed regulations)
- Unavailability of placement after a showing of active efforts to find a placement

Court may not consider the socio-economic status of one placement versus another.

Key Provisions

State must furnish to BIA all final adoption decrees/orders from state court

- Specific information is required (includes enrollment info)
- This information is not subject to FOIA (privacy is protected)

State must establish single location for all voluntary/involuntary foster care, pre-adoptive placement, and adoptive placements and make available within 7 days upon request by the Indian child's tribe or DOI

- Should include at a minimum the complaint, all substantive orders, and record of placement determination

For Further Information

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